

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Sections 309(j) and)	WT Docket No. 99-87
337 of the Communications Act of 1934)	
as Amended)	RM-9332
)	
Promotion of Spectrum Efficient)	
Technologies on Certain Part 90)	
Frequencies)	
)	
Establishment of Public Service Radio)	
Pool in the Private Mobile)	
Frequencies Below 800 MHz)	
)	

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

REPLY COMMENTS OF RADSCAN, INC.

Radscan, Inc. ("Radscan"), by its attorneys, and pursuant to § 1.415(a) of the Commission's Rules, hereby submits its reply comments in response to the *Notice of Proposed Rule Making* in the above-captioned proceeding.¹

I. The Commission Should Interpret the "Public Safety Radio Services" Exemption from Competitive Bidding Broadly Consistent With Congressional Intent.

In granting the Commission expanded authority to award licenses by competitive bidding, Congress carved out an important exception for what it termed "public safety radio services." According to the plain language of the statute, this exemption applies to *all* licenses for radio services that are used to protect the safety of life, health or property, as long as the radio services are

1. Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, *Notice of Proposed Rule Making*, FCC 99-52 (rel. Mar. 25, 1999) ("Notice").

not made commercially available to the public.² Moreover, as the Commission has recognized, the legislative history deliberately encourages a broad reading of the public safety radio services exemption.³ Indeed, the USMSS, Inc. (“USMSS”) is probably correct when it states that “*all* private wireless communications protect the safety of the life, health, and property of the public -- and, as such, should be auction exempt.”⁴ Nevertheless, many commenters struggle to demonstrate why certain services should be included within the exemption and, by implication, why others should be excluded. However, the record is devoid of any sound reason why the exemption should not be given broad applicability.

The American Petroleum Institute (“API”), for example, asserts that pipeline and petroleum companies’ use of spectrum satisfies “vital internal communications needs” and promotes “safe and efficient operation” of their businesses.⁵ In a similar vein, United Telecom Council (“UTC”) asserts that radio services are “essential to the continued safe operation of the electric grid,” and “prevent the loss of system integrity [of water systems].”⁶ However, the plain fact is that *all* users of private

2. The relevant statutory language excludes from auctions licenses “for public safety radio services, *including* private internal radio service used by State and local governments and non-government entities *and including* emergency road service provided by not-for-profit organizations that -- (i) are used to protect the safety of life, health or property; and (ii) are not made commercially available to the public.” 47 U.S.C. § 309(j)(2)(A) (emphasis added). The quoted prefatory language merely *includes* two specific types of services within the exemption, and clearly cannot be read to exclude other types of services. The operative language is contained in clauses (i) and (ii) as paraphrased in the text above.

3. See Notice at ¶ 21, 27.

4. USMSS comments at 5 (emphasis in original).

5. API comments at 5.

6. UTC comments at 9.

wireless systems use radio to satisfy their business needs, promote the safety of their workers and the public, and enhance their efficiency. The claim that a radio service is “vital” to the conduct of a business does nothing to advance the inquiry. The Commission does not decide which uses of radio spectrum are somehow more important to the conduct of a business than others.

A coalition of utilities, pipelines, and railroads (the “CII Coalition”) asserts that Congress intended to include “critical infrastructure industries” within the exemption for public safety radio services.⁷ In comments in another proceeding, the coalition has asserted that “(a) Critical Infrastructure Industry Providers depend on internal radio systems in order to provide services that protect life, health and property; (b) Critical Infrastructure Industry Providers rely on the use of their internal radio communications systems to support the nation’s infrastructure; and (c) these radio services are not made commercially available to the public.”⁸ Clauses (a) and (c) merely restate the statutory basis for exemption from auctions,⁹ and the coalition clearly is correct that any use that satisfies these criteria is auction-exempt. On the other hand, clause (b) -- the use of radio services to “support the nation’s infrastructure” -- is nowhere to be found in the statute or its legislative history, and the coalition gives no reason why it is relevant to the inquiry. There simply is no “infrastructure” test for inclusion within the public safety radio services exemption.

API, UTC, and the CII coalition also attempt to justify the inclusion of radio services used by their industries within the exemption for public safety radio services by noting that in many cases

7. CII coalition comments at 8.

8. Amendment of the Commission’s Rules Regarding Multiple Address Systems (WT Docket No. 97-81), *Joint Supplemental Comments* at 8-9 (filed Oct. 30, 1998).

9. See 47 U.S.C. § 309(j)(2)(A)(i) and (ii), reproduced in the notes above.

their industries are under a legal obligation to use radio frequencies in their businesses.¹⁰ However, this reasoning cannot be used as a test for inclusion within the statutory exemption. Under long-settled case law, *all* industries are under a legal compulsion to use radio services in the conduct of their business as long as the benefits of doing so exceed the costs.¹¹

Since the public safety radio services exemption applies to any private internal radio service that is used to protect the safety of life, health or property and is not made commercially available to the public, the Commission's inquiry into the scope of this exemption should be relatively straightforward. A "private internal radio service" means a radio service that is used to meet the internal communications needs of the licensee.¹² CellNet Data Systems, Inc. ("CellNet") is correct that the Commission should not restrict a private internal radio service to one in which "all messages are transmitted between fixed operating positions located on premises controlled by the licensee and the associated fixed or mobile stations or other transmitting or receiving devices of the licensee."¹³ There is no requirement in the statute concerning the control of the premises where fixed stations

10. See API comments at 7-8 ("API members are subject to various laws, regulations, codes and standards which require them to utilize reliable, redundant and secure communications systems"); UTC comments at 10-11 ("utilities and pipelines are under specific public safety obligations that compel them to operate internal communications networks"); CII comments at 19-21 (use of radio spectrum "in many cases is required to comply with Federal and state regulations").

11. See *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (tugboat operator held liable for failure to equip boat with radio despite no statutory requirement to do so).

12. See Amendment of the Commission's Rules Regarding Multiple Address Systems, *Notice of Proposed Rule Making*, 12 FCC Rcd 7973, 7980 [¶ 12] (1997); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2353-54 (1994); GTECH Corporation et al., *Memorandum Opinion and Order*, 13 FCC Rcd 4290 (1998).

13. CellNet comments at 10.

are placed, nor is there a requirement concerning the ownership of mobile transmitting or receiving devices. These are fundamentally business issues that do not change the nature of the radio service provided over licensed frequencies.

CellNet also is correct that the requirement that a service is “not made commercially available to the public” is satisfied when the licensee receives compensation for the goods and services it provides using radio spectrum as one of its business inputs, as long as the licensee does not receive compensation for the use of the spectrum itself.¹⁴ If the Commission were, to the contrary, to interpret this requirement as a restriction to non-commercial licensees, then nearly all of the auction-exempt uses of the spectrum proposed by commenters would be excluded, since nearly all of those uses, including those of utilities, pipelines, and railroads, are for the benefit of for-profit businesses.¹⁵ This would be contrary to the explicit intent of Congress to exempt the uses of “utilities, railroads, [and] pipelines” from auctions.¹⁶

II. The Commission Should Not Restrict Any Band to Public Safety Radio Services if that Band Contains Non-Exempt Incumbent Licensees.

As the Commission has recognized, the creation of an exemption from the competitive bidding requirements for public safety radio services may require that portions of the spectrum be set aside as exempt from competitive bidding. However, any such set-aside band should *not* be restricted to *only* public safety radio services if the band contains non-exempt incumbent licensees.

14. CellNet comments at 10-11.

15. Thus, UTC surely did not intend to exclude internal uses of for-profit businesses by arguing that exempt spectrum must be used to meet “non-commercial” needs. UTC comments at 13.

16. H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. at 572 (1977).

Instead, the Commission should use frequency coordination and other techniques at its disposal to limit instances of mutually exclusive applications in any band that contains both public safety radio service licensees and non-exempt licensees.

As Radscan noted in its initial comments, incumbents cannot simply be grandfathered or relocated to other spectrum without causing serious disruptions in service. The comments overwhelmingly support this conclusion. For example, UTC argues that incumbent users must be permitted to expand or modify their systems prior to the introduction of auctions in any band in which incumbents are licensed, and be allowed to make modifications to their systems even after such spectrum is auctioned.¹⁷ While UTC's comments are directed at the introduction of auctions into a band containing auction-exempt incumbents, UTC's reasoning supports the same conclusion with respect to the introduction of a restriction to public safety radio services into a band containing incumbents that do not meet the restriction. The situations are similar because in each case incumbent licensees are threatened with systems that would be frozen in place after auction-driven licensing changes take effect. Since continued access to particular frequencies often is necessary for efficient operation, grandfathering existing systems in place is not good spectrum management.¹⁸

17. UTC comments at 22-24.

18. When UTC's constituency is not threatened by the restrictions, UTC favors strict grandfathering rules. See Joint Supplemental Comments in WT Docket 97-81 at 20 (proposing to grandfather incumbents "provided that they do not expand their systems or otherwise encroach on the operations of Critical Infrastructure licensees."). However, when the shoe is on the other foot, UTC recognizes that incumbent licensees must be permitted to expand their systems, both before and after licensing restrictions go into effect. See UTC comments at 21-24.

API and UTC both argue strenuously that site-by-site incumbents should not be relocated from bands the Commission may decide to set aside for geographic licensing.¹⁹ Commonwealth Edison (“Com Ed”) agrees that public safety radio service licensees may not be “relegated to incumbent status in an auction context and thus unable to grow or modify their systems freely”; such action would “effectively paralyze their operations.”²⁰ Again, the same reasoning requires that the Commission not relocate ineligible incumbents from *any* band that it may decide to set aside for public safety radio services. Relocating incumbents is expensive, disruptive, and impractical.

Moreover, neither grandfathering nor relocating incumbents is necessary to further the Commission’s statutory obligations under the Balanced Budget Act. For example, no commenter disputes that the frequency coordination and first-come, first-served licensing procedures applicable to private bands such as the 928/935/956 MHz MAS band virtually eliminate the possibility of mutually exclusive applications.²¹ Therefore, these bands can continue to be licensed under current procedures by public safety radio service licensees and all others who satisfy the licensing requirements of the band.

19. API comments at 13-14; UTC comments at 21-22. *See also* American Electric Power Service comments at 3 (describing the work required to relocate incumbents as “staggering”).

20. Com Ed comments at 20.

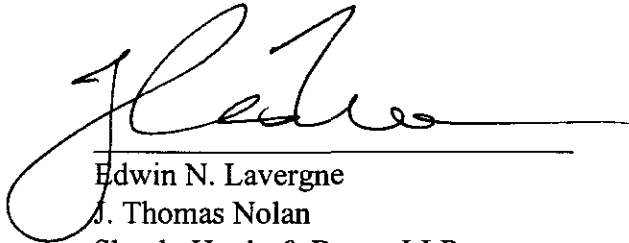
21. API comments at 16 (“mutual exclusivity among applicants [for the 928/952/956 MHz MAS bands] is extremely rare”); USMSS comments at 4 (“existing licensing procedures . . . do not generate mutually exclusive applications”). *See also Notice* at ¶ 13 (“[t]he traditional approach to the licensing of users of private spectrum generally does not result in the filing of mutually exclusive applications”).

CONCLUSION

The Commission should give effect to Congressional intent by interpreting the public safety radio service exemption from competitive bidding broadly. The exemption should be available to all licensees of private internal radio services that are used to protect the safety of life, health or property, as long as the radio services are not made commercially available to the public. While many private internal radio services will satisfy these criteria, the Commission should not set aside a given spectrum band for only auction-exempt uses if non-exempt incumbents occupy that band. Instead, the Commission should use other techniques such as frequency coordination and settlement procedures to minimize the possibility of mutually exclusive applications being filed that would trigger the auction requirements for that band.

Respectfully submitted,

RADSCAN, INC.

A handwritten signature in black ink, appearing to read 'Edwin N. Lavergne', is written over a horizontal line.

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